Supreme Court, U.S.
FILED

041466 APR 16 2005

OFFICE OF THE CLERK

IN THE
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 2004

ROBERT W. GRINE, II; JOANNE D. GRINE; ESTATE OF MARGARET M. GRINE, *Petitioners*

v.

RONALD W. COOMBS, Executor of the Estate of WILLIAM R. COOMBS, DECEASED; BILLIE M. YOST; JACK W. SHRUM; ROTOCAST PLASTIC PRODUCTS; ESSEX ENVIRONMENTAL INDUSTRIES, INC.; TIONESTA BOROUGH COUNCIL, OF FORREST COUNTY; RONALD HALL, President of Borough Council, in an individual and official capacity; SCOTT DAUM, BOROUGH MANAGER OF TIONESTA, in an individual and official capacity; COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"); GARY WOZNIAK, in an individual and official capacity as an agent of the DEP; DANIEL HOLLER, Emergency Response Coordinator, Northwest Region, in an individual and official capacity, as an agent of the DEP; MICHAEL MCCABE, Regional Administrator, Region III, U.S. E.P.A.; COLLEEN CALL, in her official capacity only as Administrator of Tionesta Borough; UNITED STATES OF AMERICA ENVIRONMENTAL PROTECTION AGENCY (EPA);
Respondents

On Petition for a Writ of Certiorari
To the Third Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Janice Haagensen
349 New Road
Enon Valley, PA 16120
Tel: (724) 336-5962

Attorney for Petitioners
Robert W. Grine II, Joanne D. Grine, and
the Estate of Margaret M. Grine

QUESTION PRESENTED

I. Whether the Court of Appeals erred and denied substantive and procedural due process to plaintiff-petitioners because it invited the appellees to petition for damages against the plaintiffs' counsel on grounds that her end-of-case appeal of final orders was frivolous, even though the Court of Appeals never conducted an objective review of the ultimate merits of plaintiff-petitioners' challenges to final orders.

TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Writ:

The decision of the Court of Appeals should be reviewed because it erodes public confidence in the integrity of the judicial process; it also conflicts with this Court's precedents, and with settled law in the Third Circuit 7

Conclusion 13

TABLE OF AUTHORITIES

Cases

Hilmon Co. (V.I). v. Hyatt International,
899 F.3d 250 (3rd Cir. 1990) 9
Knight v. General Motors, 511 U.S. 659 (1994) 10
Mellon Bank Corp. v. First Union Real Estate
Equity and Mortgage Investments,
951 F.2d 1399 (3rd Cir. 1999) 9
Quiroga V. Hasbro, Inc. 943 F.2d 346 (3rd Cir. 1991) 10
Sauers v. Commissioners, 771 F.2d 64 (3rd Cir. 1985),
cert. den. 476 U.S. 1162 (1986) 9

Constitutions

U.S. Const. Amend. V 2

Statutes

5 U.S.C. §552 3
28 U.S.C. §1254(1) 1
28 U.S.C. §1331 2,8
33 U.S.C. §1251 et. seq. 2
42 U.S.C. §6901 et seq. 2
42 U.S.C. §9601 et seq. 3
35 Pa. Stat. Tit. 35 §6020.101 3

OPINIONS BELOW

The collateral order of the United States Court of Appeals of October 21, 2004 taxing attorney fees against the appellants' counsel appears at Appendix A (App. A), and it is unreported. The decision of the U.S. Court of Appeals denying the timely-filed petition for rehearing appears at Appendix B (App. B) and it is unreported.

GROUNDS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The order of the United States Court of Appeals affirming the district court's order of May 5, 2003 (dismissing petitioners' cause of action in its entirety with prejudice pursuant to Fed. R. Civ. Proc. 41(b)) was issued on May 28, 2004. Costs were taxed against appellants on May 28, 2004. The Court of Appeals denied Petitioner-Appellants' timely-filed final petition for rehearing on September 14, 2004. Petition for Certiorari was filed with this Court at No. 04-1965 and denied on March 21, 2005. A collateral and interlocutory order granting the federal and borough appellees their Rule 38 motion for attorney fees was granted on October 21, 2004.

The question presented did not arise until Petitioners received the Third Circuit Court of Appeals' collateral order of October 21, 2004 imposing large financial sanctions against plaintiffs' counsel.

Petitioners thereupon sought rehearing and argued that the Court of Appeals had erred for numerous reasons and that its decision resulted in fundamental unfairness and a violation of the due process clause of the federal constitution. Appellants' petition for rehearing of the Order of October 21, 2004 was denied on January 18, 2005.

The jurisdiction of the United States District Court for the Western District of Pennsylvania was invoked pursuant to 28 U.S.C. §1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case concerns the Fifth Amendment to the United States Constitution which provides, in pertinent part, that "No person shall ... be deprived of life, liberty or property, without due process of law, . . ."

STATEMENT OF THE CASE

Petitioners' initial complaint was filed on December 21, 1995; their Amended Complaint was filed on April 2, 1996. Petitioners are Robert W. Grine, II, Joanne D. Grine, and the Estate of Margaret M. Grine; Defendants were William R. Coombs, deceased; Billie M. Yost; Jack Shrum, et ux.; Essex Environmental Industries, Inc.; Rotocast Plastic Products, Inc.; Tionesta Borough Council, Ronald Hall, President of Borough Council, in an individual and official capacity; Scott Daum, Borough Manager of Tionesta, in an individual and official capacity; Commonwealth of Pennsylvania, Department of Environmental Protection; Daniel Holler, Emergency Response Coordinator, Northwest Region, in an individual and official capacity; Gary Wozniak, in an individual and official capacity; United States of America Environmental Protection and Michael McCabe, Regional Administrator, Region III, U.S. EPA. (The acting administrators of the U.S. EPA have been substituted in his place.)

Petitioners brought suit under the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §6901 et. seq., the Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. §1251 et. seq., and the Comprehensive Environmental Response, Compensation, and Liabilities Act

of 1980 ("CERCLA"), 42 U.S.C. §9601 et seq., as amended by the Superfund Amendments and Reauthorization act of 1986. Petitioners also brought suit under the Freedom of Information Act, 5 U.S.C. §552. The Amended Complaint also asserts causes of action under the state common-law theories of intentional infliction of emotional distress, trespass, nuisance and strict liability, as well as a claim pursuant to the Pennsylvania Hazardous Sites Cleanup Act ("PHSCA"), 35 Pa. Stat. Tit. 35, §6020.101 et seq.

Petitioners were the victims of rogue or midnight dumping of acutely hazardous toxic substances transported in federally-licensed overpack drums abandoned in close proximity to their home and private water supply. After they sued individual owners of the site, transporters, corporate entities who generated the waste, and government agencies which had failed to investigate the nature and extent of the contamination, Petitioners became the targets of a grand jury convened to investigate the commission of an environmental crime, and were surveilled by federal agents.

Petitioners' end-of-case appeal was necessitated by the following events: On October 23, 2001, the district court certified pursuant to Rule 54(b) its order dismissing the plaintiffs' amended complaint against the U.S. EPA for lack of Article III or subject-matter jurisdiction. The district court certified its order for immediate appeal and simultaneously attempted to stay the appeal indefinitely. Plaintiff-appellants had no choice but to file an immediate appeal of an order characterized by the district court as ripe for an immediate appeal. Their appeal was docketed at No. 01-4118, and scheduled for full briefing on December 18, 2001 by the Court of Appeals.

On January 14, 2002, the federal defendants in a Rule 27 motion represented that the district court acted with great propriety in certifying an order for immediate appeal and then staying the appeal (in reliance on Rule 62) until the end of the case, and asked the appellate court to dismiss the

appeal of that certified order for lack of jurisdiction over the subject matter. The Court of Appeals summarily dismissed for lack of subject-matter jurisdiction over the appeal of an order certified pursuant to Rule 54(b) by the district court. The Court of Appeals apparently never assessed the propriety of the district court's Rule 54(b) certification of the order in question.

Appellants filed a timely petition for rehearing of the order of February 27, 2002, on April 11, 2002; that petition was denied by the appellate court on April 23, 2002. Appellants realized when they attempted to procure the record from the clerk at the appellate court that the record had been certified to the district court on February 27, 2002, 45 days prior to the deadline for submission of a timely petition for rehearing. Appellants believed that the clerk of court had prematurely issued the mandate in violation of the plain language of Fed. R. App. Proc. Rule 41. Appellants requested on August 27, 2002, that correction or revision of the record be effected; on August 29, 2002, a clerk denied this Rule 27 motion and in doing so stated that the mandate had in her estimation issued on February 27, 2002; "the February 27, 2002 order dismissing the appeal was certified to the district court on the date that it was issued." She also made the representation that the mandate would never be issued by her court. In effect, the appellants realized that they had been stripped of their right to submit a petition for rehearing in the expectation of its meaningful review because the Court of Appeals on February 27, 2002 informed the district court that appellants' Petition for Rehearing would be denied, without review; the appellate court was apparently relinquishing jurisdiction to the district court in advance of any review of the petition for rehearing. Or else the appellate court had failed to issue the mandate at all, and was refusing to do so in the future.

On July 19, 2002, at No. 02-218, appellants filed a Petition for Certiorari with the U.S. Supreme Court. The federal defendants in the brief in opposition to the petition for

certiorari directly contradicted the statements made in the Rule 27 motion for dismissal, which emphasized the complete propriety of the district judge's actions; however, in their brief in opposition, they characterized the conduct of the district court judge as self-defeating; i.e., wrong as a matter of law. The federal defendants at this point admitted that the appeal was improperly certified. The U.S. Supreme Court denied the plaintiffs' petition for certiorari on November 18, 2002.

On August 12, 2002, the district court judge entered orders dismissing the complaint against an individual borough defendant for insufficiency of service, and entered a second order denying the plaintiffs' motion to conform the EPA's pleadings to its proof.

On September 24, 2002, plaintiffs filed a motion to vacate all orders filed by the district court subsequent to April 23, 2002, for lack of jurisdiction over the subject-matter of their cause of action, on grounds that the Court of Appeals failed to issue the mandate in compliance with Fed. R. App. Proc. Rule 41(d), and instead prematurely relinquished its jurisdiction. In the hearing of September 26, 2002, the district court judge denied the plaintiffs' motion to vacate and set deadlines for completion of discovery and plaintiffs' response to a summary judgment motion by the executor of the Coombs estate. He set further deadlines in his published order of September 26, 2002.

On October 8, 2002, plaintiffs appealed from the orders of August 12, 2002, and the order of September 26, 2002, denying their motion to vacate the court's orders a nullities. Their appeal was docketed on October 16, 2002, at No. 02-3816.

The case was on appeal at No. 02-3816 from October 8, 2002 at least through March 28, 2003. The mandate should have issued on April 4, 2003. All discovery activities in the district court were precluded due to the pendency of this

appeal. No activity whatsoever should have taken place in the district court during this period.

On November 13, 2002, a Rule 27 motion was jointly filed by the federal appellees, EPA and Michael McCabe, and a non-federal appellee, Scott Daum, who was not a proper party to the appeal, to dismiss the appeal for lack of subject-matter jurisdiction.

Plaintiffs made their reply to this motion on November 25, 2002. On January 8, 2003, the Rule 27 motion of federal and non-federal appellees to dismiss for lack of subject-matter jurisdiction was summarily granted. On January 10, 2003, a certified copy of the order of January 8, 2003, was transmitted to the district court. A timely petition for rehearing was filed by plaintiffs on February 19, 2003, and summarily denied on March 28, 2003. Plaintiffs immediately motioned to the Court of Appeals to stay the mandate on April 2, 2003; defendants petitioned for leave of court to file a response out of time to this motion. The clerk of court responded on April 25, 2003, by stating that the plaintiffs' motion could not be considered or reviewed; instead she represented that no action whatsoever would be taken in response to submission of plaintiffs' motion because no case-dispositive order had been entered and thus no mandate would ever issue in regard to plaintiffs' appeal.

Plaintiffs then submitted a motion to stay the mandate at No. 02-3816 pending the filing of a petition for certiorari to the U.S. Supreme Court.

On January 17, 2003, in a telephonic status conference, the district court judge amended the order of September 26, 2002, to reflect that all discovery deadlines had run while the case was in appeal, and directed the plaintiffs to respond without benefit of discovery to summary judgment motions; the judge also enforced the previous order's deadline as set for submission of pre-trial narrative statements. The order of

January 17, 2003, was never published by the court in compliance with federal rules of procedure.

On January 17, 2003, when the district court convened the litigants and sought to amend its challenged order of September 26, 2002, plaintiff-appellants were only nine days into the time period allotted for submission of their petition for rehearing at No. 02-3816; and did not file it until February 19, 2003. Plaintiffs were of the opinion that jurisdiction followed the mandate, which could not issue until seven days subsequent to the entry of the order denying their petition for rehearing. That order was not issued until March 28, 2003.

On February 19, 2002, plaintiffs appealed the order of January 17, 2002, amending the order of September 26, 2002, which eliminated all right to discovery. Their appeal was docketed on February 25, 2003 at No. 03-1509. The briefing orders did not issue until April 14, 2003. The petitioners' brief at No. 03-1509 was filed on May 23, 2003. After the brief was on the record, the Court granted the federal defendants' Rule 27 motion to dismiss the appeal for lack of jurisdiction over the subject-matter, on August 8, 2003. The lower court's last order dismissing the petitioners' cause of action in its entirety in reliance on Rule 41(b) was published on May 5, 2003. The clerk of the United States Supreme Court, Mr. William Suter, wrote in his letter to Petitioners of May 14, 2003, that the mandate had never issued from the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. The decision of the Court of Appeals should be reviewed because it erodes public confidence in the integrity of the judicial process; it also conflicts with this Court's precedents, and with settled law on the Third Circuit.

The Third Circuit Court of Appeals has taken a truly unprecedented action in levying damages in the amount of $44,000 against the appellants' counsel on grounds that their appeal of final orders was frivolous, in the absence of any review whatsoever of the merits of their appeal. They have instead summarily affirmed a district court order of dismissal made pursuant to Rule 41(b). Nowhere in that opinion was there a finding (nor could there have been) as to the merits of an end-of-case appeal, as governed by Rule 38, Fed. R. App. Proc. The district court may well have been so opinionated it might condemn the appeal in advance but it lacked jurisdiction over any challenge to its own orders taken at the end of the case. It had no power to make use of Rule 38. Federal Rule of Appellate Procedure Rule 38 states that an appellate court must determine that an appeal is frivolous if it intends to award damages to the appellees. As the appellate court accurately stated, "Damages are awarded based on the merits of the appeal . . " Op. Of October 21, 2004, at 4.

In its order of May 28, 2004, the Court of Appeals summarily affirmed the district court order of May 5, 2003, dismissing all of plaintiff-petitioners' claims with prejudice, against all defendants, pursuant to Rule 41(b), Fed. R. Civ. Proc. The Court of Appeals summarily affirmed the district court's order "for the reasons set forth in the district court's Memorandum Opinion without further elaboration." It then footnoted a reference to Rule 38, Fed. R. App. Proc., stating that the appellees could take the initiative and decide if they wished to petition for damages.

The Court of Appeals relied completely on the district court's "reasons for dismissing all claims against the . . . defendants under Rule 41(b)." Op., at 3. The appellate court stated that it was in full agreement with the district court's analysis and conducted no original review. The district court order which it affirmed was based on the district court's use of Rule 41(b), Fed. R. Civ. Proc.; the district court could not and did not make any reference to Rule 38, Fed. R. App. Proc.

It is only an appellate court (not the appellees and not the lower court) that has the power to make a determination as to the frivolity of an appeal if damages are to be awarded. The appellate court made no such determination; it summarily affirmed a specific court order of the district court without fresh analysis; and did so by limiting itself to affirmance of the district court's use of Rule 41(b).

Rule 38 is a rule of appellate procedure. The district court is not an appellate court. The district court had no power whatsoever to assess the merits of the plaintiffs' end-of-case appeal through reliance on or recourse to Rule 38. And in fact it did not do so. As precedent tells us, it is necessary to first evaluate the appeal on its merits in order to make a finding as to its frivolity.

The Court of Appeals must employ an objective standard in demonstrating whether an appeal is frivolous and can only impose damages when an appeal is found to be wholly without merit. Mellon Bank Corp. v. First Union Real Estate Equity and Mortgage Investments, 951 F.2d 1399 (3rd Cir. 1991); Hilmon Co. (V.I.) v. Hyatt International, 899 F.2d 250 (3rd Cir. 1990). The Court of Appeals never scrutinized the ultimate merits of the appellants' use of authority, or their presentation of fact, or the reasonableness of their arguments. Given these deficiencies, it failed to satisfy the objective standard of review which the Third Circuit imposed on itself in Mellon and Hilmon. The Court can only impose damages under Rule 38 when an appeal is wholly without merit. See Sauers v. Commissioners, 771 F.2d 64 (3rd Cir. 1985), cert. den. 476 U.S. 1162 (1986). Because the appellate court never reviewed the arguments used by plaintiffs on the merits, it could not assert that any of these arguments were beyond the reasonable contemplation of fair-minded people, that appellants had not dealt fairly with the court, or that appellants misrepresented the law of existing precedent, or the facts.

Appellants most definitely addressed the authority against their position and never misrepresented the record below. The Court of Appeals grossly misrepresented the record below when stating (after their judgment was rendered) that plaintiff-petitioners never engaged in discovery.

The Court of Appeals summarily endorsed what the District Court judge wrote in reliance on Rule 41(b). This summary approach cannot be identified with even the pretense of objectively analyzing the appellants' challenges to that order, and to the other separately entered orders that were of record. See Quiroga v. Hasbro, Inc., 943 F.2d 346 (3rd Cir. 1991). Furthermore, unfounded requests for sanctions on appeal can themselves be frivolous and sanctionable.

The Court of Appeals never took up on the merits the plaintiffs' arguments that the district court did not lack for Article III or Case-or-Controversy jurisdiction over a federal question. The Court never discussed any of plaintiffs' uses of authority in the form of U.S. Supreme Court and existing Third Circuit precedent on this subject; i.e., precedent to the effect that the District Court conducted a merits analysis of ultimate fact when it should have been assessing the sufficiency of threshold jurisdictional allegations. The Court of Appeals never approached or construed even a single case relied on by plaintiff-petitioners for this proposition. This was error. See Knight v. General Motors, 511 U.S. 659 (1994).

The Court of Appeals never took up on the merits the plaintiffs' argument that the district court was wrong in refusing to hold the federal defendants in contempt when it made judicial findings of fact that established without doubt the federal witnesses' highly deliberate corruption of the record. Plaintiff-appellants then and now, stand by the absolute truth of this argument. The Court of Appeals very deliberately refrained from reviewing the record on appeal and it never displayed any intention of looking at the truth of this assertion.

The Court of Appeals relied completely on the rationale supplied by the district court. That court of course did not and could not conduct an analysis of the merits of the appeal based on Rule 38. Circuit Judge Nygaard, who apparently perceived the nature of the problem, attempted to make such a determination after judgment was rendered in the form of an order granting the federal and borough appellees' Rule 38 petition for attorney fees. In the absence of any finding of frivolity in the judgment rendered by the appellate court, the appellees had no right to move for costs, and the court was never vested with the power to invite them to file such a motion (See Rule 38). The Court of Appeals in effect conducted a witch hunt after judgment was rendered. (Even in Salem, this would have raised eyebrows.)

What the appellate court failed to do in rendering judgment or in simply affirming without explanation a single order of the district court, it attempted to justify after the fact. Any such procedure deprives both the plaintiffs and their counsel of due process of law.

In editing an opinion after judgment was rendered and awarding huge costs to the federal appellees ($44,000, and climbing), Judge Nygaard took the truly unprecedented position of representing that petitioners should be punished for the filing of a successful appeal (at No. 98-3494, in which petitioners reversed in part the judgment of the district court). No mention whatsoever of the fact that plaintiffs prevailed in this effort is acknowledged by the circuit court judge. Judge Nygaard also made the mysterious comment that plaintiffs' counsel, "despite direct orders from us," "failed to provide or request discovery . . " Op., at 3. In the first place, the Court of Appeals never ordered the plaintiffs to conduct discovery (they had no jurisdiction to do so). Secondly, it is a gross falsehood to state that plaintiffs never engaged in or conducted requests for discovery – specifically from the federal appellees. The Court of Appeals is not free to falsify the record in this or in any other of its aspects.

Judge Nygaard went on to state that "even after a patient and detailed explanation of the procedural history and rationale for dismissal by the District Court . . . Attorney Haagensen nevertheless filed another appeal."" Op., at 5. Appellants had a constitutional and statutory right to challenge the district courts' final order; that right would be meaningless if it could be removed from them by the district court. The district court has no power to categorically forbid a challenge to its own orders; this fact should have been glaringly apparent to the Court of Appeals.

The Court of Appeals dismissed the appeals taken at No. 02-3816 and No. 03-1509 summarily, for lack of jurisdiction over the subject-matter. It is breathtaking and unprecedented for an appellate judge to state that it is his belief that the arguments on which these appeals were grounded were frivolous in nature, when an assessment of these appeals on their merits was never conducted by the court (nor could it have been, since the summary dismissals were jurisdictional). Had the Court of Appeals wished to conduct a review on the merits, it could have done so. It could have done so, that is, if the Court had not dismissed these appeals on jurisdictional grounds. No judge was free as of October 2, 2004 or on any other day after dismissal, to adjudicate on the merits of these appeals. For a judge to issue an opinion on the merits after a jurisdictional dismissal and to use that statement to try to make a finding of frivolity after the fact, is a shocking exhibition of bias, and a deprivation of appellants' rights to due process of law. Judge Nygaard had no power to rely on his personal opinion that appeals dismissed for lack of subject-matter jurisdiction were "premised on frivolous arguments," (Op., at 5), when the Court as an adjudicative body never reached the merits of these appeals.

Judge Nygaard has also made the erroneous statement that prematurity of an appeal is equivalent to frivolity. This analysis is absolutely wrong, as a matter of black-letter law. If the Court lacks subject-matter jurisdiction, or no order characterized as final is of record, the "prematurity" of an

appeal taken in those circumstances has never been confused with frivolity by any other circuit courts of appeal in the land. Prematurity is related to timing and not to the merits.

As detailed in our statement of the case, pursuant to Rule 54(b), the district court judge certified as ripe for immediate appeal an order dismissing claims against the federal defendants for lack of subject-matter jurisdiction (though he also, inexplicably, attempted to then delay the appeal through mysterious [and, again, unprecedented] reference to Rule 62). This 12(b)(1) dismissal for lack of jurisdiction was of course in no sense a "judgment" in favor of the federal defendants, or a "judgment" on the merits. It was a dismissal based on the alleged absence of Article III (case-or-controversy) jurisdiction.

In the opinion of May 28, 2004, the appellate court stated that "on October 21, 2001, the district court entered a final judgment under Fed. R. Civ. P. 54(b) in favor of the United States Environmental Protection Agency . . ." Op., at 2. (Appendix, Pet. for Cert. at No. 04-965.) The Court of Appeals summarily, on a Rule 27 Motion, dismissed the appeal at No. 01-4118, for lack of jurisdiction over the subject-matter. (This is apparently one of the "premature" appeals referenced by Judge Nygaard.) The Court of Appeals is not free to argue after it engineered a jurisdictional dismissal that the Rule 54(b) certification was unflawed and did in fact constitute a "final judgment."

It is impossible to reconcile the statement that the order of October 21, 2001 was a "final judgment" with the appellate court's dismissal of plaintiffs' appeal of that order for lack of jurisdiction over the subject matter.

Circuit Judge Nygaard went on to say that "this final appeal followed a carefully written and detailed analysis by the District Court, which attorney Haagensen failed to even address in her brief." Op. At 7. Judge Nygaard is again suggesting that the district court should have the power to

punish and intimidate any party insisting on their right to challenge its orders. This is not the law. Furthermore, the record demonstrates that plaintiffs filed a detailed, lengthy (50-page) brief appealing nine other district court orders in addition to the last order put on the docket by the district court. They extensively briefed their arguments to these challenged orders. It is highly improper for the appellate court's judge to represent anything to the contrary

As discussed, the Court did nothing but affirm the District Court's Rule 41 order. It never even acknowledged the existence of the other free-standing orders that were challenged in our appeal. Our end-of-case appeal dealt with highly serious topics (such as the creation of an imminent security risk in time of war, in plain sight of government employees), and was in no sense frivolous. It was as we have said, a deadly serious challenge to government policy and practice.

The plaintiffs at all times acted in good faith and in full compliance with the Federal Rules of Civil Procedure.

They stand by the merits of their arguments, the truth of their assertions, their appropriate use of existing precedent to make their case, and their absolute right to file an end-of-case appeal of final orders, despite the hostility displayed by a district court judge in denial as to the value of any criticism of his judicial conduct.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: April 16th, 2005

Respectfully submitted,

Janice S. Haagensen
Counsel of Record
349 New Road
Enon Valley, PA 16120
Telephone (724) 336-5962

IN THE
SUPREME COUT of the UNITED STATES

ROBERT W. GRINE, II; JOANNE D. GRINE; ESTATE OF MARGARET M. GRINE,
Petitioners

v.

THE ESTATE OF WILLIAM R. COOMBS, et al,
Respondents

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

Petitioners, Robert W. Grine, II, Joanne D. Grine, and the Estate of Margaret M. Grine, respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeal for the Third Circuit entered in this proceeding on October 21, 2004.

APPENDIX

Appendix A	Order and Decision of Third Circuit Court of Appeals Granting the Appellees' Motion for Costs.
Appendix B	Decision of the United States Court of Appeals Denying the Petition for Rehearing.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No: 03-3028

ROBERT W. GRINE, II; JOANNE D. GRINE; ESTATE OF MARGARENT M. GRINE,
Appellants

v.

RONALD W. COOMBS, Executor of the Estate of WILLIAM R. COOMBS, DECEASED; BILLIE M. YOST; JACK W. SHRUM; ROTOCAST PLASTIC PRODUCTS; ESSEX ENVIRONMENTAL INDUSTRIES, INC.; TIONESTA BOROUGH COUNCIL, OF FORREST COUNTY; RONALD HALL, President of Borough Council, in an individual and official capacity; SCOTT DAUM, BOROUGH MANAGER OF TIONESTA, in an individual and official capacity; COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"); GARY WOZNIAK, in an individual and official capacity as an agent of the DEP; DANIEL HOLLER, Emergency Response Coordinator, Northwest Region, in an individual and official capacity, as an agent of the DEP; MICHAEL MCCABE, Regional Administrator, Region III, U.S. E.P.A.; COLLEEN CALL, in her Official Capacity Only as Administrator of Tionesta Borough; UNITED STATES OF AMERICA ENVIRONMENTAL PROTECTION AGENCY;

On Appeal from the United States District Court
For the Western District of Pennsylvania
(Civ. No. 95-cv-00342E)
District Judge: Hon. Sean J. McLaughlin

Submitted Under Third Circuit LAR 34.1(a)
May 13, 2004
Before: NYGAARD, McKEE and CHERTOFF,
Circuit Judges

(Filed October 21, 2004)

OPINION OF THE COURT

NYGAARD, Circuit Judge.

The United States District Court for the Western District of Pennsylvania, McLaughlin, J., acting *sua sponte*, dismissed Appellants' case with prejudice because of the willful misconduct of Appellants and their counsel. *Grine v. Coombs et al.*, 214 F.R.d. 312, 371 (W.D. Pa. 2003).

In its opinion, the District Court took great care to outline the various ways in which Appellants and their counsel have delayed this case. So, it is unnecessary to repeat them all here. Essentially, after seven years of pre-trial maneuvering in the District Court, Appellant was still unprepared for trial and refused to comply with the District Court's case management schedule. Ultimately, the District Court dismissed the case in its entirety with prejudice. Appellants then filed their eighth appeal. We affirmed. *Grine v. Coombs*, 2004 WL 1179349 *1 (3d. Cir. May 28, 2004).

This case has languished in the federal court system for more than eight years. During its pendency there have

been eight appeals to this court, seven petitions for rehearing, and five petitions for certiorari to the United States Supreme Court. Of the eight appeals brought in this court, all but three have been dismissed in whole or in part as premature, hence it was patent that we lacked jurisdiction. Each petition for reconsideration and petition for certiorari has been denied.

Despite direct orders from us and the District Court, Attorney Haagensen has refused to comply with case management schedules, failed to provide or request discovery, and made no response to Appellees' motions for summary judgment. She has repeatedly used improper litigation techniques and filed improper appeals, ultimately extending this case unnecessarily over an eight-year period. The District Court specifically found that these delays and tactics were not innocent mistakes of judgment by Attorney Haagensen; rather, the District Court determined that her behavior was "willful and not merely negligent or inadvertent." *Grine*, 214 F.r.D. at 369. These findings were fully supported by the record, and in affirming the District Court's order, we adopted much of the learned District Court's reasoning. *Grine*, 2004 WL 1179349 *1.

The Federal Appellees and Borough Appellees now petition for Rule 38 damages, seeking compensation for some of the financial loss they incurred in defending their judgments on appeal. There are three issues before us:

Should we award damages? If so, in what amount? And, against whom? We conclude that Rule 38 damages are warranted and we will award them in the amount requested by the Appellees, against counsel for Appellant, Janice Haagensen.

The decision whether to appeal from an order of the District Court is not a matter to be taken lightly. An appeal is a serious matter. Consequently, if an appeal is wholly lacking in merit the rules provide for serious consequences. *Beam v. Bauer*, 2004 WL 2002548, at *1 (3d Cir. Sept. 9, 2004). Attorney Haagensen must now face these consequences.

Federal Rule of Appellate Procedure 38 states that, "[I]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." Fed. R. App. P. 38. Although not every dismissal or ruling by a district court is without error, it is the responsibility of counsel, in this case, attorney Haagensen, to determine whether an appeal would be frivolous.

Rule 38 damages are not awarded as a punishment or sanction. *Huck v. Dawson*, 106 F.3d 45, 52 (3d Cir. 1997). Damages are awarded based on the merits of the appeal, without consideration as to whether Appellant acted with

malice, ignorance or deceit. *Beam*, 2004 WL 2002548, at *2. Instead, damages are awarded to compensate a party when they "suffer pecuniary loss by paying attorney fees to defend a valid judgment against a frivolous appeal," because the party is "entitled to be awarded damages as is a victim seeking compensation for any other financial loss incurred by the acts of a tortfeasor." *Id.* Rule 38 serves to make a party whole after it has been forced to expend money to protect a valid judgment in its favor from a meritless appeal. *Id.*

Here, even after a patient and detailed explanation of the procedural history and rationale for the dismissal by the District Court – all fully supported by the record and the law – attorney Haagensen nevertheless filed another appeal. She persists in her misguided argument that the District Court did not have jurisdiction, an argument contradicted by our earlier orders. In sum she fails to provide any reason why the District Court erred.

In addition to requesting attorney's fees from this last appeal, the federal appellees have also requested attorney's fees for two earlier appeals, docketed at numbers 02-3816 and 03-1509. Both of these appeals were clearly from non-final orders, premature, and were dismissed because it was obvious that we lacked appellate jurisdiction. Those appeals were also premised on attorney Haagensen's frivolous argument that the District Court lacked jurisdiction.

In her response to the petition for damages attorney Haagensen does not challenge the propriety of the amount of damages requested,[1] she seems instead to argue that because the District Court never "certified or sought to certify any of the plaintiff's appeals as frivolous," they could not be frivolous.[2] Secondly, she seems to argue that because we dismissed for lack of jurisdiction there was no decision on the merits of her appeal and thus, presumably, that the appeals could not have been meritless. Third, she argues that the "district court in its [last] order could not and did not have anything to say in regard to the merits of any future appeal ...", and, "[t]here is no certification as to frivolity [in the District Court's last order] as relates to any appeal whatsoever filed by the plaintiffs." These arguments miss the point.

As appellants' counsel, it is attorney Haagensen's job, and not that of the District Court, to determine when an

---

1 Attorney Haagensen failed to address whether *vel non*, Appellees were entitled to damages for the earlier appeals that we dismissed as taken from non-final orders, nor the dollar amounts claimed by the appellees' counsel, nor does she provide any argument that the amounts were unjustified. Rather, attorney Haagensen indicated her opinion that the taxpayers should ask for their money back and that the government could learn from the appellants' method of litigation. We note parenthetically that as we will now award the government lawyers costs and attorney's fees from defending their judgments on appeal, this money will, in fact, be returned to the taxpayers.

appeal is proper and what issues would be legitimate on appeal. Moreover, although her statement that "[p]rematurity even if established is not the equivalent of frivolity or lack of merit" is correct, her appeals in this case were so patently premature, they were unquestionably frivolous. Finally, it's not the responsibility of the courts to warn litigants that their appeals "which ha[ve] yet to be filed" lack merit.

Because Appellant has not challenged the amounts of these fees, (nor do we see any need to raise the issue *sua sponte* as there is nothing shocking in the amount and the fees do not appear to be inflated), we will award the amount requested, a total of $44,936.13. Of this amount, $42,317.13 is payable to the Federal Appellees, and $2,691 to the Borough Appellees.

The final question is whether we should place the responsibility for paying these costs and fees on the appellants, their attorney, or both. A party is entitled to rely on his or her attorney for legal advice. *Beam*, 2004 WL 2002548 at *3. Although a party should also be diligent in pursuing its claims, they are not expected to understand procedure or law to the same extent as their counsel, particularly in the courts of appeal. We have repeatedly placed responsibility for Rule 38 damage awards on counsel

---

[2] Appellants' response to the petition for fees is neither well written nor logically presented, requiring that we try to make sense

when a frivolous appeal is the result of counsel's professional error, and we will do so here. *See e.g., Nagle v. Alspach*, 8 F.3d 141, 145 (3d Cir. 1993).

It should have been evident to a reasonable attorney that the appeals in this case were frivolous. On five occasions, including two for which we have awarded attorney's fees, the orders appealed were not appealable. This final appeal followed a carefully written and detailed analysis by the District Court, which attorney Haagensen failed to even address in her brief. She has presented no reason throughout the history of this litigation to demonstrate that the responsibility for these appeals lies anywhere but with her. It is appropriate, therefore, that counsel bear the burden of paying the damages.

On final note: Counsel for the appellant contends that her client is entitled to an evidentiary hearing. We disagree. She has not raised any evidentiary issues. So, no hearing is indicated.

In conclusion, we will award damages to appellees in the amount of $44,936.13, to be paid by Appellant's counsel, attorney Haagensen. Of this amount, $42,317.13 is payable to the Federal Appellees, and $2,691.000 to the Borough Appellees.

---

out of the various statements, claims and arguments.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No: 03-3028

ROBERT W. GRINE, II; JOANNE D. GRINE; ESTATE OF MARGARENT M. GRINE,
Appellants

v.

RONALD W. COOMBS, Executor of the Estate of WILLIAM R. COOMBS, DECEASED; BILLIE M. YOST; JACK W. SHRUM; ROTOCAST PLASTIC PRODUCTS; ESSEX ENVIRONMENTAL INDUSTRIES, INC.; TIONESTA BOROUGH COUNCIL, OF FORREST COUNTY; RONALD HALL, President of Borough Council, in an individual and official capacity; SCOTT DAUM, BOROUGH MANAGER OF TIONESTA, in an individual and official capacity; COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"); GARY WOZNIAK, in an individual and official capacity as an agent of the DEP; DANIEL HOLLER, Emergency Response Coordinator, Northwest Region, in an individual and official capacity, as an agent of the DEP; MICHAEL MCCABE, Regional Administrator, Region III, U.S. E.P.A.; COLLEEN CALL, in her Official Capacity Only as Administrator of Tionesta Borough; UNITED STATES OF AMERICA ENVIRONMENTAL PROTECTION AGENCY;

Appeal from the United States District Court
For the Western District of Pennsylvania
(Civ. No. 95-CV-342)
District Judge: Hon. Sean J. McLaughlin

Submitted Under Third Circuit LAR 34.1(a)
May 13, 2004

Before: NYGAARD, McKEE and CHERTOFF,

Circuit Judges

ORDER

1) The Federal Appellees Motion for attorney's fees is **GRANTED** in full, amounting to $42,317.13. This Motion is granted without prejudice to Appellees returning to this Court to recover costs and fees expended in litigating this motion.

2) The Borough Appellees Motion for attorney fees is **GRANTED** in full, amounting to $2,691.00. This Motion is granted without prejudice to Appellees returning to this Court to recover costs and fees expended in litigating this motion.

3) The above damages are to be paid by Grine's counsel, Janice Haagensen.

/s/ Richard L. Nygaard
Circuit Judge

Dated: October 21, 2004

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No: 03-3028

ROBERT W. GRINE, II; JOANNE D. GRINE; ESTATE OF MARGARENT M. GRINE,
Appellants

v.

RONALD W. COOMBS, Executor of the Estate of WILLIAM R. COOMBS, DECEASED; BILLIE M. YOST; JACK W. SHRUM; ROTOCAST PLASTIC PRODUCTS; ESSEX ENVIRONMENTAL INDUSTRIES, INC.; TIONESTA BOROUGH COUNCIL, OF FORREST COUNTY; RONALD HALL, President of Borough Council, in an individual and official capacity; SCOTT DAUM, BOROUGH MANAGER OF TIONESTA, in an individual and official capacity; COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"); GARY WOZNIAK, in an individual and official capacity as an agent of the DEP; DANIEL HOLLER, Emergency Response Coordinator, Northwest Region, in an individual and official capacity, as an agent of the DEP; MICHAEL MCCABE, Regional Administrator, Region III, U.S. E.P.A.; COLLEEN CALL, in her Official Capacity Only as Administrator of Tionesta Borough; UNITED STATES OF AMERICA ENVIRONMENTAL PROTECTION AGENCY;

On Appeal from the United States District Court
For the Western District of Pennsylvania
(Dist. Court No. 95-cv-00342E)

SUR PETITION FOR REHEARING

BEFORE: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, MCKEE, BARRY, AMBRO, FUENTES, CHERTOFF, FISHER, and VAN ANTWERPEN, Circuit Judges,

---

The Petition for rehearing filed by the Appellant on December 3, 2004 in the above-entitled matter having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered.

By the Court,

/s/ Richard L. Nygaard

United States Circuit Judge

DATED: January 18, 2005
RLS/cc: JSH
RJG
MJS
BRS